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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

R.W., individually and on behalf of his marital community,

Plaintiff.

V.

COLUMBIA BASIN COLLEGE, a public institution of higher education, RALPH REAGAN, in his official and individual capacities, LEE THORNTON, in his official and individual capacities.

Defendants.

Cause No. 4:18-cv-05089-RMP

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Thomas S. Foley United States
Courthouse
920 W. Riverside Ave, Room 840
Spokane, WA 99201

1 In seeking to avoid summary judgment, the Defendants repeatedly attempt to
2 equate a person seeking help from a medical provider regarding violent thoughts as
3 the same as threatening another person. The position the Defendants have put
4 forth reflects poorly on Columbia Basin College (CBC) and its employees.
5 Defendants argue that CBC was justified in sanctioning R.W. for threats of
6 violence when CBC has admitted that R.W. did not make any such threats.
7 Defendants' argue that R.W. is not a qualified student with a disability when they
8 have repeatedly pointed out that R.W. could have attempted to re-enroll after he
9 was disenrolled from CBC. Because Defendants have failed to raise a genuine
10 issue of material fact as to liability, the Court should grant R.W.'s motion for
11 partial summary judgment.

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15 **A. There Is No Genuine Dispute Of Material Fact That R.W.'s**
16 **Instructors Began Falsifying Reasons For His Dismissal**
17 **From The Nursing Program And That R.W. Was In-Fact**
18 **Disenrolled From The Nursing Program.**

19 The Defendants take issue with the characterization that the instructors at
20 CBC began falsifying reasons for R.W.'s dismissal from the program. In doing so,
21 CBC states that the "discontinuation form [issued to R.W.] was not effective."
22 *Defendants' Statement of Disputed Material Facts, ECF No. 44, pg. 5.* However,
23 Defendants' citation to the record does not support this proposition. Ralph Reagan
24 testified that he had no knowledge regarding the discontinuation form. *See*
25 *Warring Decl. at Exhibit 4, ECF No. 35-4 (Reagan Dep. 169:3 to 169:8); Eisinger*

1 Decl. at Exhibit F, ECF No. 37-6, pg. 1; Uhrich Supp. Decl. ¶ 5, ECF No. 54-1, pg
2 2. Reagan's deposition testimony is that he merely stopped Ms. Tucker's letter
3 regarding R.W.'s purported breach of ethics from being sent. Warring Decl. at
4 Exhibit 4, ECF No. 35-4 (Reagan Dep. 169:9 to 169:25). There is no dispute that
5 R.W. was discontinued from the nursing program, otherwise there would be no
6 need for him to attempt to "re-enroll" or seek dispensation from the President of
7 CBC to re-enroll in the nursing program. See Eisinger Decl. at Exhibit P, ECF No.
8
9 37-16, pg. 1; Hoerner Decl., ECF No. 34, pg. 1. Defendants' have not pointed to
10 any other explanation or documentation as to how R.W. became disenrolled from
11 the Nursing Program.

12
13 Defendants' also point to R.W.'s deposition where he agrees the academic
14 progress alerts issued by instructor Valerie Topham (Cooke) "may or may not be
15 true." Defendants' Statement of Disputed Material Facts, ECF No. 44, pg. 5. The
16 Nursing Program maintains a policy on when to issue academic progress alerts.
17
18 Uhrich Supp. Decl. at Exhibit A, ECF No. 54-1, pgs. 8-9. R.W.'s did not qualify
19 for issuance of a mandatory academic progress alert on March 7, 2017 for class
20 NRS 223. Id; compare Eisinger Decl. at Exhibit E, ECF No. 37-5, pg. 2 with
21
22 Uhrich Decl. at Exhibit C, ECF No. 40-3, pg. 4. According to the CBC Nursing
23
24 Program Student Handbook, "[s]tudents not maintaining a 2.0 grade in any nursing
25 course will receive an Academic Progress Alert [...] by the instructor at midterm

1 or as soon as it becomes evident that the student is failing if this occurs after
2 midterm." *Uhrich Supp. Decl. at Exhibit A, ECF No. 54-1, pg. 8.* R.W. was
3 maintaining a grade point higher than 2.0 as of March 7, 2017. *Uhrich Decl. at*
4 *Exhibit C, ECF No. 40-3, pg. 4.*

5 More importantly, the Nursing Program Student Handbook makes it clear
6 that the purpose of such alerts is "the early identification of students who are
7 having difficulties meeting course or program outcomes and providing the support
8 necessary for successful course and program completion." *Uhrich Supp. Decl. at*
9 *Exhibit A, ECF No. 54-1, pgs. 8-9.* Ms. Cooke admitted she issued these alerts
10 only after learning that R.W. had sought treatment from "a doctor" for his violent
11 thoughts. *Eisinger Decl. at Exhibit C, ECF No. 37-3 (Cooke Dep. 84:4 to 84:7;*
12 *85:13 to 85:19).* March 7, 2017, is the date of discontinuation noted by Director of
13 Nursing Kim Tucker and the stated basis in the notice is "incomplete winter
14 quarter trespassed from campus." *Eisinger Decl. at Exhibit F, ECF No. 37-6, pg.*
15 1. Defendants' have not explained how academic progress alerts, which are for the
16 purpose of remediation, were legitimately issued on the same day R.W. was
17 discontinued from the program. The nursing school faculty were thereafter told on
18 March 13, 2017 that R.W. would not be returning to the program. *Eisinger Decl.*
19 *at Exhibit AF, ECF No. 37-32, pg. 1.*

1 Each of these actions were taken in quick succession after Defendants'
2 learned that R.W. went to Crisis Response. *Eisinger Decl. at Exhibit E, ECF No.*
3 *37-5, pg. 1; Eisinger Decl. at Exhibit F, ECF No. 37-6, pg. 1; Eisinger Decl. at*
4 *Exhibit AE, ECF No. 37-31, pg. 1.* R.W. stands by the characterization of these
5 facts.

7 **B. There Is No Genuine Issue Of Material Fact That R.W.
8 Was Subject To Discipline For Protected Speech.**

9 The Court should grant R.W.'s motion for partial summary judgment on the
10 claims brought under 42 U.S.C. § 1983 because there is no genuine issue of
11 material fact that Defendants' violated R.W.'s rights under the First Amendment.
12
13 The Defendants' legal arguments are addressed in the Plaintiff's Memorandum in
14 Opposition to Defendants' Motion for Summary Judgment. *See ECF No. 45, pgs.*
15 *12-21.* However, Defendants' seek to avoid a rather inconvenient fact.
16 Defendants' opposition is premised on the actions a school can take when a student
17 makes threats of violence. *See e.g. Defendants' Response to Plaintiff's Motion for*
18 *Summary Judgment, pgs. 6-7* ("R.W.'s analysis fails to cite, much less distinguish,
19 the two most recent, germane Ninth Circuit Court of Appeals cases regarding
20 threats of school violence."); pg. 7 ("For instance, College Republicans at San
21 Francisco State University v. Reed, 523 F.Supp.2d 1005, 1007 (N.D. Cal. 2007),
22 which R.W. relies heavily upon, did not involve threats of school violence."); pg. 9
23
24
25

1 ("[H]ere the College reasonably concluded that R.W. presented a credible,
2 identifiable threat of school violence").
3

4 The problem for Defendants' is that CBC has admitted R.W. did not engage
5 in any threats:

6 INTERROGATORY NO. 10: Please identify the manner that [R.W]
7 violated WAC 132S-100-205 of the CBC Student Code of Conduct,
8 and **whether you allege that he committed any of the following**
9 (answer as to each):

- 10 **a. Physical and/or verbal abuse;**
- 11 **b. Threats;**
- 12 **c. Intimidation;**
- 13 **d. Harassment;**
- 14 e. Online harassment;
- 15 f. Coercion;
- 16 g. Bullying;
- 17 h. Cyberbullying;
- 18 i. Retaliation;
- 19 j. Stalking;
- 20 k. Cyberstalking;
- 21 1. Other conduct which threatens or endangers the health or safety of
22 any person or which has the purpose or effect of creating a hostile or
23 intimidating environment.

24 ANSWER:

- 25 **a. N/A**
- b. N/A**
- c. N/A**
- d. N/A**
- e. N/A
- f. N/A
- g. N/A
- h. N/A
- i. N/A
- j. N/A

1 1. Other conduct which threatens or endangers the health or safety of
2 any person or which has the purpose or effect of creating a hostile or
3 intimidating environment – [R.W.] was found by a preponderance of
4 the evidence to have violated this provision of the CBC Student Code
of Conduct.

5 *Uhrich Supp. Decl. at Exhibit B, ECF No. 54-2, pgs. 12-13 (emphasis added).*

6 Reagan further narrowed the prohibited conduct at issue to “other conduct which
7
8 has the effect of creating a hostile or intimidating environment.” *Eisinger Supp.*
9 *Decl. at Exhibit H, ECF No. 47-8; Eisinger Supp. Decl. at Exhibit F, ECF No. 47-*
10 *6 (Reagan Dep. 152:15 to 152:20).* It should not be a surprise to Defendants that
11 R.W. believes case law regarding threats of violence in school is inapplicable
12 where CBC agrees R.W. did not make threats of violence in school. Because R.W.
13 did not threaten others and it is undisputed that CBC nevertheless punished R.W.
14 for his speech, the Court should grant R.W.’s motion for partial summary judgment
15 establishing liability on the claims brought under 42 U.S.C. § 1983.
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18 **C. There Is No Genuine Issue Of Material Fact That R.W. Is A
19 Qualified Individual With A Disability Where CBC
20 Proposed Solution Is That R.W. Should Re-Enroll And Seek
21 Special Dispensation From The School President To Rejoin
22 The Nursing Program.**

23 The Court should grant the motion for partial summary judgment,
24
25 concluding that R.W. was a qualified individual with a disability and that CBC

1 sanctioned R.W. because of his disability.¹ In opposing the motion for summary
2 judgment, Defendants argue that R.W. is not a qualified individual. In doing so,
3 Defendants cite to a series of employment cases beginning with *Davis v. Meese*,
4 692 F. Supp. 505 (E.D. Pa. 1988), which predates the Americans with Disabilities
5 Act. While there are parallels between employment-based disability discrimination
6 claims and those brought against public accommodations, it is unclear why
7 Defendants resort to non-binding authority when the Ninth Circuit has addressed
8 these issues in the employment context. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d
9 1243, 1246-48 (9th Cir. 1999) (analyzing whether an employee is qualified with or
10 without accommodations and whether the employee's disability posed a direct
11 threat of safety to others). "To protect disabled individuals from discrimination
12 based on prejudice, stereotypes, or unfounded fear, the Supreme Court has required
13 an individualized direct threat inquiry that relies on the best current medical or
14 other objective evidence." *Id.* at 1248 (*citing Bragdon v. Abbott*, 524 U.S. 624,
15 649 (1998)). Defendants' position that R.W. is not a qualified individual with a
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21 ¹ R.W. agrees that no claims are brought under the ADA and RHA against Reagan
22 and Thornton individually. Only the state-law discrimination claims are brought
23 against the individual defendants. *ECF No. 1, pg. 8; see State v. Arlene's Flowers,*
24 *Inc.*, 441 P.3d 1203, 1237 (Wash. 2019).

1 disability seems irreconcilable with CBC's position that R.W. could attempt to re-
2 enroll. *See Eisinger Decl. at Exhibit P, ECF No. 37-16, pg. 1; Hoerner Decl., ECF*
3 *No. 34, pg. 2.*

5 The Ninth Circuit has also expressed strong skepticism regarding the
6 "distinction between disability-caused conduct and disability" argument, noting
7 that such distinction only exists in disability cases "involving illegal drug use or
8 alcoholism." *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1140 n. 18 (9th
9 Cir. 2001). "For purposes of the ADA, with a few exceptions, conduct resulting
10 from a disability is considered to be part of the disability, rather than a separate
11 basis for termination." *Id.* at 1139-40. Defendants' seek to downplay Reagan's
12 admission that he in part attributed R.W.'s "ideations to depression and insomnia"
13 because Reagan was not "diagnosing him." *Defendants' Response to Plaintiff's*
14 *Motion for Summary Judgment*, pg 5. However, Reagan's subjective attribution of
15 R.W.'s "conduct" to his disability is highly relevant to whether CBC intentionally
16 (or recklessly) discriminated against R.W. based on his disability. Importantly,
17 there is no dispute as to what events led CBC to sanction R.W.:
18

21 As per our conversation at the meeting, you explained that you had homicidal thoughts due to
22 stress and lack of sleep with the possibility of medication being a factor. When you had
23 homicidal thoughts you immediately contacted your primary care doctor because you were
24 concerned. Your doctor recommended that you go to Crisis Response and you were voluntarily
25 admitted to Lourdes. I understand that the result of your behavior was not to create a hostile or
intimidating environment, but it had the same effect. Therefore you are found responsible for
violating our policy on Abusive Conduct. I reviewed the materials you provided and after my
investigation and thoughtful consideration of everything that occurred, the sanctions are as
follows:

Eisinger Decl. at Exhibit P, ECF No. 37-16, pg. 1. If CBC, through Reagan, attributed these actions to R.W.’s disability and CBC did not rely “on the best current medical or other objective evidence” to conclude R.W. was a direct threat, then liability under the ADA and RHA for intentional discrimination is conclusively established. In light of the fact that both Reagan and Thornton subjectively concluded R.W. was not a direct threat, the Court should grant the motion for summary judgment establishing liability. *See Eisinger Decl. at Exhibit H, ECF No. 37-8 (Reagan Dep. 148:1 to 148:7); Eisinger Supp. Decl. at Exhibit I (Thornton Dep. 40:17 to 41:19; 42:3 to 42:15).*

CONCLUSION

The Court should grant R.W.'s motion for partial summary judgment and establish liability on the claims brought under 42 U.S.C. § 1983, for prospective injunctive relief for violation of R.W.'s Constitutional rights, and the claims brought under the ADA, RHA and WLAD. If the Court accepts the position of Defendants' in this matter, the message to those suffering from depression is clear: don't seek help, don't tell anyone, and handle it yourself. Such a result is contrary to both the text and purpose of the ADA, RHA and WLAD in eradicating disability discrimination and would further lend the government unprecedented power in restricting the lawful speech of private individuals. Society at-large is benefited when people with depression and mental illness are able to receive medical help

1 without repercussion. Defendants' fail to appreciate that in the long-run, their
2 approach will result in more untreated mental illness and more violence occurring.
3 As a result, the Court should grant R.W.'s motion for partial summary judgment.
4

5 DATED this 8th day of July, 2019.

6
7 *s/Bret Uhrich*
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Carl P. Warring: carlw@atg.wa.gov

s/ *Bret Uhrich*
Bret Uhrich